This must clearly mean at the least and other considerations, questions and issues apart, that evidence would have to be led, and in turn, on the authorities, that an originating summons is not a suitable medium or process for the determination of the issues raised.

The application must be allowed and the originating summons dismissed *in limine*.

On the question of costs, I have thought at first of making an order that each party should bear its own costs but on further consideration I have come to the view that the plaintiff is wanting in frankness and I cannot but regard his last affidavit as a distortion of facts apparent even on a cursory reading of the subsequent agreement. In these circumstances, the plaintiff should be made to bear the costs of the proceedings and I so order.

Application allowed.

Solicitors: *Lim Cheng Ean & Co.; Maxwell, Kenion, Cowdy & Jones.*

PUBLIC PROSECUTOR v. ADNAN BIN KHAMIS

[A.Cr.J. (Syed Agil Barakbah) August 18, 1971]

[Alor Star — Criminal Appeal No. 16 of 1971]

Criminal Law and Procedure — Judicial Precedent — Conflicting opinions of appellate courts — Decisions of Court of Appeal of Federated Malay States and of Court of Appeal of Sarawak, North Borneo and Brunei — Malaysia Act, 1963, s. 88(3).

Penal Code, s. 304A — Negligence — Standard of negligence.

In this case the accused had been charged with causing the death of one Abdul Halim by doing a negligent act, to wit shooting with a shot gun. The learned president of the sessions court acquitted the accused on the ground that the negligence shown in the case was not of such a high degree as required for a case of manslaughter as laid down in *Cheow Keok* v. *Public Prosecutor*.[1] On appeal,

Held, allowing the appeal: (1) there was a conflict between the decision of the Court of Appeal of the Federated Malay States in *Cheow Keok* v. *Public Prosecutor* and the decision of the Court of Appeal of Sarawak, North Borneo and Brunei in *Public Prosecutor* v. *Mills*[10] and until the question of the two conflicting decisions is settled by the Federal Court, the court was, by virtue of section 88(3) of the Malaysia Act, bound by the decision of *Public Prosecutor* v. *Mills* which is deemed to be a decision of the Federal Court;

(2) in this case the action of the accused in firing the shot that killed the deceased was a negligent act and the prosecution had proved a *prima facie* case against the accused and therefore the accused should be called upon to enter on his defence.

Cases referred to:-

(1) *Cheow Keok* v. *Public Prosecutor* [1940] M.L.J. 103, C.A.

(2) *Krishnan* v. *Public Prosecutor* [1948] M.L.J. 12.

(3) *R.* v. *Bateman* (1925) 94 L.J.K.B. 791, C.C.A.

(4) *Andrews* v. *Director of Public Prosecutions* [1937] A.C. 576 H.L. at pp. 582, 583; [1937] 2 All E.R. 552 at pp. 555, 556.

(5) *R.* v. *Jones* (1874) 12 Cox C.C. 628.

(6) *R.* v. *Weston* (1879) 14 Cox C.C. 346, 352.

(7) *R.* v. *Archer* (1858) 1 F. & F. 351; 175 E.R. 760.

(8) *R.* v. *Campbell* (1869) 11 Cox C.C. 323.

(9) *Mah Kah Yew* v. *Public Prosecutor* [1971] 1 M.L.J. 1.

(10) *Public Prosecutor* v. *Mills.* [1971] 1 M.L.J. 4.

(11) *Woo Sing & Anor.* v. *R.* [1954] M.L.J. 200.

(12) *Anthonysamy* v. *Public Prosecutor* [1956] M.L.J. 247.

(13) *China Insurance Co. Ltd.* v. *Loong Moh Co. Ltd.* [1964] M.L.J. 307.

(14) *K.E. Mohamed Sultan Maricar* v. *Prudential Assurance Co. Ltd.* [1941] M.L.J. 20.

(15) *Hendry* v. *De Cruz* [1949] M.L.J. Supp. 25.

(16) *Butler-Madden* v. *Krishnasamy & Ors.* [1947] M.U.L.R. 163.

(17) *Velazquez Ltd.* v. *Inland Revenue Commissioners* [1914] 3 K.B. 458 at p. 461.

(18) *Young* v. *Bristol Aeroplane Co. Ltd.* [1943] 1 K.B. 718

MAGISTRATE'S CRIMINAL APPEAL.

Abdul Malik bin Mohamed Salleh (Deputy Public Prosecutor) for the appellant.

R. C. Murugeson for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah J.: This is an appeal by the learned deputy public prosecutor against the acquittal and discharge of the respondent under section 304A of the Penal Code by the learned president of the sessions court, Sungei Patani.

The charge reads as follows: —

"That you on the 27th day of December, 1969, at about 6.45 a.m. at Bukit Tupah, Merbok, in the mukim of Merbok, in the district of Kuala Muda, in the State of Kedah, caused the death of one Abdul Halim bin Saad by doing a negligent act not amounting to culpable homicide, *to wit*, by shooting with a double barrel shot gun No. 117080 in the jungle of Bukit Tupah, and that you have thereby committed an offence punishable under section 304A of the Penal Code."

The main ground of appeal was that the learned president in acquitting and discharging the respondent without calling upon him to enter on his defence acted against the weight of evidence adduced by the prosecution. It was submitted there was sufficient evidence adduced by the prosecution to prove the necessary high degree of negligence on the part of the respondent as required by the case of *Cheow Keok* v. *Public Prosecutor*.[1]

The facts of the case were sufficiently dealt with by the president and it is not necessary for me to repeat them. In concluding the facts, the learned president cited *Krishnan* v. *Public Prosecutor*,[2] the relevant portion of which says: —

"... It is essential to elicit evidence to show the actual situation with which the driver was faced in relation to his speed and other factors of driving and whether he got into this situation through his own or another's carelessness or rashness. The fact of knocking down a pedestrian on the road is not *ipso facto* conclusive of gross negligence."

The case was connected with a motor vehicle accident but he was of the opinion that the same principle ap-

plies to the present case. At the close of the prosecution he came to the conclusion that there was no evidence regarding the factors and the only evidence adduced by the prosecution and accepted by him was that the respondent had shot the deceased who died as a result. He further held that if any inference were to be drawn of the respondent's negligence, he was of the opinion that such negligence was not of such a high degree as required for a case of manslaughter in English law as laid down in *Cheow Keok's* case. He outlined four surrounding circumstances of the case and came to the conclusion that all these factors were in favour of the respondent. This point is dealt with at a later stage below.

Now, the accepted principle in *Cheow Keok's* case is that a higher degree of negligence is necessary to render a person guilty of manslaughter than to establish civil liability against him. Mere carelessness is not enough. Negligence in order to render a person guilty of manslaughter must be more than a matter of compensation between subjects (*i.e.* more than civil negligence); it must show some disregard for the life and safety of others as to amount to a crime against the State. (*R.* v. *Bateman;*[3] *Andrews* v. *Director of Public Prosecutions.*[4])

It was submitted by the learned deputy public prosecutor that the duty of care on the respondent to see that he did not endanger human lives when firing the gun was higher than, say, that of the driver of a motor vehicle driving along the highway because a gun was a deadly weapon. He referred to *Halsbury's* Laws of England, 3rd Edition, Volume 10, page 717, paragraph 1375: —

"The negligent use of a dangerous weapon or other dangerous thing likely to cause death in an improper place or without taking proper precautions to avoid injury will, if the degree of negligence is such as to constitute criminal negligence, render the owner guilty of manslaughter."

I agree with him. However, it should be noted that the degree of negligence required is such as to constitute criminal negligence. A scrutiny of past authorities relating to death caused by negligent firing of a gun in cases of manslaughter point to one salient factor that in all these cases such high degree of negligence was established. In *R.* v. *Jones,*[5] Lush, J. directed the jury that if the prisoner pointed the gun at the deceased without examining whether it was loaded or not, he was guilty of manslaughter. In *R.* v. *Weston,*[6] the gun was levelled by a poacher at a gamekeeper but without intention of discharging it. In *R.* v. *Archer,*[7] during a struggle for a loaded gun to the possession of which the prisoner was entitled, it went off. Lord Campbell C.J. directed a verdict of guilty on the ground that the prisoner had no right to take the gun by force. In *R.* v. *Campbell,*[8] the prisoner fired a gun at the deceased and the jury apparently believed that the prisoner did not know that it was loaded.

At the end of his grounds of judgment the learned president pointed out that he had written his grounds prior to the date when the following cases were reported: —

(a) *Mah Kah Yew* v. *Public Prosecutor;*[9]

(b) *Public Prosecutor* v. *Mills.*[10]

Mah Kah Yew's case is a decision of the Court of Criminal Appeal of Singapore, also concerning section 304A of the Penal Code. Wee Chong Jin C.J., in his judgment discussed *Cheow Keok's* case and referred to the decision of the Court of Appeal of Sarawak, North Borneo and Brunei in *Public Prosecutor* v. *Mills.* On page 3, section 88(3) of the Malaysia Act, 1963, was referred to. The section reads as follows: —

"Anything done before Malaysia Day in or in connection with or with a view to any proceedings in the Court of Appeal of the Federation, or of Sarawak, North Borneo and Brunei, or of Singapore, or the Court of Criminal Appeal in Singapore, shall on and after that day be of the like effect as if that court were one and the same court with the Federal Court."

It was concluded that the decision in *Public Prosecutor* v. *Mills* has the like effect as if the court is the Federal Court and therefore it must be accepted that the nature and degree of negligence in an act causing death required to support a conviction under section 304A of the Penal Code is the same as that in any other act carried out so rashly or negligently as to endanger human life or the safety of others where that act was the immediate cause of death and not the remote cause. It was further concluded that the decision in *Cheow Keok's* case was not a decision of the Court of Appeal of the Federation of Malaya but was the decision of the Court of Appeal of the Federated Malay States. As such it has only a higher persuasive authority to the Singapore Court Criminal of Appeal. In *Public Prosecutor* v. *Mills,* Williams C.J. (President) disagreed with the opinion of the trial judge that the standard of negligence required to sustain a conviction under section 304A must be equivalent to that high standard required to sustain a conviction for manslaughter under English law. At page 5 thereof the learned Chief Justice said as follows: —

"Nothwithstanding the opinion of *Ratanlal* in 'Law of Crimes' and the decision of *Cheow Keok* v. *Public Prosecutor, supra,* which was not followed in *Woo Sing & Anor.* v. *R.,* I am of the opinion that the standard of negligence required for a conviction under section 304A(1) cannot be equated with that required for a conviction for manslaughter and that although the two crimes may and indeed do overlap they are essentially different. The main feature of the offence under section 304A(1) is the causing of death by doing an act which was rash or negligent which was neither designed nor voluntary. The opinion expressed by the Full Court of Singapore in *Woo Sing & Anor.* v. *R., supra,* is, I consider, sound: it is to the effect that the Penal Code is not a codification of English law and it is dangerous, particularly in homicide cases, to try and introduce English case law into the consideration of the Code. English cases stress the grossness of the negligence necessary to constitute manslaughter but I am not prepared to hold that the acts of rashness or negligence which cause death must be of that very high degree before an offence under section 304A(1) can be committed."

It is noted that in Singapore since the decision of *Woo Sing & Anor.* v. *R.*[11] by the full bench of the High Court in 1954, the principle as to the standard of negligence in a case of this nature has been on the same basis as in *Mah Kah Yew* v. *Public Prosecutor* and *Public Prosecutor* v. *Mills.* The principle propounded in *Cheow Keok* v. *Public Prosecutor* was not followed. On the other hand, since its inception in 1940, the principle in *Cheow Keok's* case has been followed by the courts in Malaya as authority in numerous cases.

The only exception was in *Anthonysamy* v. *Public Prosecutor*[12] wherein Buhagiar J. in his well-reasoned judgment expounded the principle on the same lines as *Woo Sing & Anor.* v. *R.* This was, however, *obiter*, since he was bound by the decision of the Federated Malay States Court of Appeal in *Cheow Keok* v. *Public Prosecutor.* Hence, for the last thirty years the decision in *Cheow Keok's* case has been adopted as authority. It has, however, not become the subject of consideration by the Federal Court as in Singapore.

In his endeavour to strengthen his argument on the application of *Cheow Keok's* case, the learned deputy public prosecutor cited *China Insurance Co. Ltd.* v. *Loong Moh*[13] which was a civil appeal relating to a policy of insurance. The Federal Court of Malaysia sitting in Singapore dismissed the appeal and held that the point to be concluded was according to the decision of the Straits Settlements Court of Appeal in *K. E. Mohamed Sultan Maricar* v. *Prudential Assurance Co. Ltd.*[14] and intimating itself bound by that decision. There was an earlier decision in *Hendry* v. *De Cruz*[15] in which the Federation of Malaya Court of Appeal considered itself bound by its previous decision in *Butler-Madden* v. *Krishnasamy & Others*[16] which was a decision of the Malayan Union Court of Appeal. What the learned deputy public prosecutor meant was that this court should apply the doctrine of *stare decisis* as done in the two cases cited above and as dealt with in precise detail in *Mah Kah Yew* v. *Public Prosecutor.* This well established doctrine which we have inherited from England into our judicial system is based on the general principle that where there has been a decision of a court of law upon a question of principle it is not right for it to depart from that decision, whatever its views might be; otherwise there would be no finality in the law. (*Per* Cozens-Hardy, M.R. in *Velazquez Ltd.* v. *Inland Revenue Commissioners*[17]). If the decision in *Young* v. *Bristol Aeroplane Co. Ltd.*[18] is applied, I would say, in applying the doctrine in Malaysia, that the decision of the Federal Court on questions of law must be followed by the court of the first instance and would be regarded by the Federal Court as binding on itself until reversed by the Judicial Committee of the Privy Council on appeal from the Federal Court to His Majesty the Yang di-Pertuan Agong. Similarly, the decisions of the Federal Court sitting in Singapore on appeal from a Singapore court before the Republic of Singapore Independence Act, 1965, are binding on the court of the first instance in Malaysia. Further the decisions of the Court of Appeal of the Federation, of Sarawak, North Borneo and Brunei, or of Singapore, or of the Court of Criminal Appeal in Singapore before Malaysia Day are binding on the courts of first instance in Malaysia by virtue of section 88(3), Malaysia Act, 1963, (No. 26 of 1963).

Now, *Cheow Keok's* case was a decision of the Court of Appeal of the Federated Malay States and not that of the Federal Court as held in *Mah Kah Yew* v. *Public Prosecutor.* However, since it is the decision of the Federated Malay States Court of Appeal, in so far as the present case is concerned, it is binding on this court. On the other hand, the decision of *Public Prosecutor* v. *Mills* is also binding on this court being a decision of the Court of Appeal of Sarawak, North Borneo and Brunei which, according to section 88(3) of the Malaysia Act, has the like effect as if it were one and the same court as the Federal Court after Malaysia Day. It is therefore binding as authoritative precedent. Coming back to the suggestion of the learned deputy public prosecutor, I think it is not within my power to determine whether the decision in *Cheow Keok's* case has the same effect as that of the Federal Court. It is a matter properly for the Federal Court to decide as done in the *China Insurance* case and *Hendry's* case. If it decides that it should be bound by such decision, the matter does not rest there because of the conflicting decisions between that case and *Mill's* case. Here again, I think it is a matter for determination by the Federal Court.

The principle as adopted in England regarding the powers of the Court of Appeal in a matter of this nature is discussed in *Mah Kah Yew's* case. Wee Chong Jin C.J. at page 2, says as follows: —

> "In England, therefore, decisions of the Court of Appeal on questions of law must be followed by courts of first instance and are regarded by the Court of Appeal to be binding on itself until they are reversed by the House of Lords. There are, however, three exceptions to this, namely:-
>
> (i) the Court of Appeal is entitled and bound to decide which of two conflicting decisions of its own it will follow;
>
> (ii) the Court of Appeal is bound to refuse to follow a decision of its own which though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords;
>
> (iii) the Court of Appeal is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam* (see *Young* v. *Bristol Aeroplane Co. Ltd., supra*).
>
> As regards the Court of Criminal Appeal in England the general rule is that a decision of its own although considered by a subsequent court to be wrongly decided will still be followed by the court in accordance with the principles above referred to, but in cases involving the liberty of the subject, the court does not regard itself as bound by its own previous decisions and if, on reconsideration, in the opinion of a full court, the law has either been misapplied or misunderstood in a previous case and in consequence a man has been wrongly sentenced it is the duty of the court to consider whether he has been wrongly convicted (*per* Lord Goddard in *Rex* v. *Taylor*).

Until the question of the two conflicting decisions is settled once and for all, I am of the view that, for the time being, by virtue of section 88(3) of the Malaysia Act, I am bound by the decision of *Public Prosecutor* v. *Mills* which is a decision of the Federal Court.

Applying the decision to the present appeal, I hold that the prosecution has proved its case which, if unrebutted, would warrant the conviction of the respondent. As stated earlier, the president concluded there was no other evidence adduced by the prosecution except that the respondent shot the deceased who died as a result. However, at a later stage, he appeared to arrive at the conclusion that if there was negligence on the part of the respondent, such negligence did not amount to a high degree as required in in *Cheow Keok's* case. He did not consider whether there was negligence as decided in *Mill's* case. He

gave four factors which he said acted in favour of the respondent. In coming to this conclusion he erred in not having considered the surrounding facts and circumstances adequately. When the respondent, P.W. 5 and the deceased separated in the jungle after they had failed to locate the *kijang* which had been shot earlier, the only reasonable inference that arose was the respondent must have seen or known that P.W. 5 and the deceased were no longer with him. P.W. 5 from his evidence did not appear to be sure whether the deceased was following him all along to the place where he finally came to take position on a stone when he heard the shot. There was also no direct evidence that the respondent saw the *kijang* or, for that matter, something resembling it, moving in the jungle. However, in my view, considering the evidence relating to the sarong worn by the deceased at the material time, which resembled the colour of the *kijang*, and the other relevant factors, the only reasonable and irresistible inference was that the respondent must have seen something moving in the jungle. He should therefore have made doubly sure that what he saw was actually the *kijang* before he fired at it. He was in charge of a loaded gun, a lethal weapon, the use of which required care and skill. In the circumstances it was the duty of the respondent to take sufficient precautions before shooting to ensure that both P.W. 5 and the deceased were out of danger. In my opinion, his action in firing the shot that killed the deceased was a negligent act which endangered human life or the safety of others and his act was the immediate cause of the deceased's death. I am therefore of the view that the prosecution has proved a *prima facie* case which if unrebutted would warrant the conviction of the respondent.

The appeal is allowed and the case is sent back to the learned president to call for the defence.

Appeal allowed.